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No. 800

Supreme Court of the United States

OCTOBER TERM, 1958

ADOLPH C. BERGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	4
Reasons for Granting the Writ	7
I. The Decision Below Affirming Petitioner's Conviction Despite the Fact That the Record Showed That the Statute of Limitations Had Run on One Count of the Indictment Is in Conflict With Two Decisions of the Court of Appeals for the Fifth Circuit	9
II. The Decision Below That the Uncorroborated Testimony of Convicted Perjurers Was Admissible and Sufficient to Sustain a Conviction Is in Conflict With Applicable Decisions of This Court and Presents an Important Question of Federal Criminal Procedure	14
Conclusion	22
Appendix	1a
Opinion of the Court of Appeals for the Eighth Circuit	1a
Judgment of the Court of Appeals for the Eighth Circuit	15a

CITATIONS

Cases:

Caminetti v. *United States*, 242 U.S. 470	19
Communist Party v. *Subversive Activities Control Board*, 351 U.S. 115	14, 16
Currier v. *United States*, 166 F. 2d 346 (1st Cir. 1948)	7
Dean v. *United States*, 246 F. 2d 335 (8th Cir. 1957)	14
Flemister v. *United States*, 260 F. 2d 513 (5th Cir. 1958)	11, 13
Hammer v. *United States*, 271 U.S. 620	20
Hirabayashi v. *United States*, 320 U.S. 81	12
Mesarosh v. *United States*, 352 U.S. 1	14, 15
Pinkerton v. *United States*, 328 U.S. 640	12
Rosen v. *United States*, 245 U.S. 467	17
Rovario v. *United States*, 353 U.S. 53	12
Harry Sherin, 13 T. C. 221 (1949), *acq.*, 1949-2 Cum. Bull. 1	8
Sykes v. *United States*, 204 Fed. 909 (8th Cir. 1913)	20

Page

Union Stock Farms v. *Commissioner*, No. 15783, 9th Cir., March 9, 1959 (59-1 U.S.T.C. ¶9317) 7
United States v. *Haderlein*, 118 F. Supp. 346 (N.D. Ill. 1953) 21
United States v. *Reina*, 242 F. 2d 302 (2d Cir. 1957) 14, 16
United States v. *Waldman*, 160 F. Supp. 65 (D.N.J. 1958) .. 16
White v. *United States*, 216 F. 2d 1 (5th Cir. 1954) 10, 11
Yates v. *United States*, 354 U.S. 298 13

Statutes and Rules:

Ala. Code tit. 7, § 434 (1940) 17
Federal Rules of Criminal Procedure, Rule 5(c) 10
Fla. Stat. Ann. § 90.07 (1943) 17
Internal Revenue Code of 1939, § 145(b), 53 Stat. 63 ..... 2, 3, 10
Internal Revenue Code of 1939, § 3748(a), 53 Stat. 461, as amended 2, 3, 10
Md. Ann. Code art. 35, § 1 (1957) 17
Miss. Code §§ 1692, 2315 (1956) 17
N.D. Rev. Code § 31-0108 (1943) 17
Pa. Stat. Ann. tit. 19, § 682 (1930), tit. 28, § 315 (1958) 17
S.C. Code § 16-201 (1952) 17
S.D. Code § 36.0105 (1939) 17
28 United States Code § 1254(1) 2
Vt. Stat. tit. 41, § 8521 (1947) 17
Vt. Stat. Ann. tit. 12, § 1608 (1959) 17
Wash. Rev. Code §§ 5.60.040, 10.52.020 (1951) 17

Treatise:

7 Wigmore, Evidence § 2056 (3d ed. 1940) 19

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered on February 2, 1959 (Appendix, p. 15a, R. 267).[1] This judgment affirmed a judgment of the United States District Court for the Eastern District of Missouri (R. 210).

OPINIONS BELOW

The District Court prepared no separate opinion, but entered a judgment (R. 210) which is unreported. The opinion of the Court of Appeals for the Eighth Circuit (Appendix, pp. 1a-15a, R. 249-66) is as yet unreported.

[1] Citations to pages 1 through 216 of the Record refer to pages in the record of trial which was before the Court of Appeals. Citations to pages 217 through 270 refer to the record of the proceedings in that court which are part of the record filed in this Court.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court, was entered on February 2, 1959 (Appendix, p. 15a, R. 267). A timely petition for rehearing was denied on February 26, 1959 (R. 268). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

This petition presents the following important questions of federal criminal procedure, upon which the decision below conflicts with decisions of this Court and decisions of the Court of Appeals for the Fifth Circuit:

Where the record shows one count of an indictment to be barred by the statute of limitations, may a court of appeals affirm a conviction on the basis of information obtained outside the record?

Where one count of an indictment is barred by the statute of limitations but concurrent sentences were imposed, may a conviction be sustained even though most of the evidence introduced related only to the barred count?

May a conviction be sustained where the only evidence connecting petitioner with the charged offense was the testimony of two accomplices who had been convicted of perjury with respect to prior testimony on the same subject matter?

STATUTES INVOLVED

The pertinent provisions of the laws of the United States are as follows (Internal Revenue Code of 1939, §§ 145(b), 3748(a), 53 Stat. 63, 461, as amended):

Internal Revenue Code of 1939, § 145(b)

"FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Internal Revenue Code of 1939, § 3748(a)

"CRIMINAL PROSECUTIONS.—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and except that the period of limitation shall be six years—

"(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

"(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

"(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the

internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

"For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U.S.C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district."

STATEMENT

On December 18, 1953, petitioner was indicted for willful evasion of federal income taxes owed by a corporation engaged in an automobile sales and service business (R. 1). Petitioner was the president of the corporation and the owner of one-half of its stock (R. 14). The indictment contained two counts, one charging willful evasion by petitioner of corporate taxes for the fiscal year ending June 30, 1947, and the other charging such willful evasion for the fiscal year ending June 30, 1948 (R. 1, 2).

The alleged evasion grew out of the fact that during the two fiscal years in question automobiles were in short supply (R. 103, 137). Because of the difficulty in

obtaining automobiles, a number of purchasers acceded to the suggestions of two of the corporation's employee-salesmen and for certain automobiles paid, in addition to the invoice price which was paid by check made out to the corporation, an additional amount of cash to whichever of the two salesmen made the sale (R. 26, 113, 115, 118, 119, 121, 122, 124, 126, 127, 131).

Under questioning by agents of the Internal Revenue Service, both of these employee-salesmen, Carlisle Cooper and M. R. Crocker, denied under oath that they had asked for or received such additional cash payments (R. 97-99, 138, 139). For these denials, both Cooper and Crocker were indicted for perjury (R. 97, 139). Crocker entered a plea of guilty (R. 134). Cooper entered a plea of not guilty, and was tried and convicted of perjury, in spite of his denials on the witness stand, after some eleven witnesses testified that they had made such additional cash payments to him (R. 91, 97, 101). Both Cooper and Crocker served terms in prison for their perjury (R. 79, 134).

In this case, petitioner and Cooper were indicted for willful evasion of taxes owed by the corporation (R. 1, 2). Petitioner and Crocker were indicted for willful evasion of taxes owed by another corporation which had been formed in November 1946 to carry on part of the business of the corporation involved in this case (R. 139). The indictments as to Cooper and Crocker were dismissed three days before the trial of this case (R. 12, 139), and the petitioner was tried alone. At the trial below the Government produced twelve witnesses who testified that they had made cash payments to Cooper or Crocker in addition to the invoice price of the automobiles in question. The Government also called Cooper and Crocker as its witnesses. This time Cooper testified that he had received such pay-

ments, that he turned them over to petitioner in full, and that a 10 per cent commission thereon was returned to him by the petitioner (R. 82). Crocker, on the other hand, now testified that he paid 90 per cent of such payments over to the petitioner, retaining his 10 per cent commission (R. 141). Except for the testimony of Cooper and Crocker, the Government introduced no evidence to show that the petitioner received any of the amounts which Cooper and Crocker had received in cash from the purchasers of automobiles.

On cross-examination, it was shown that the indictments against both Cooper and Crocker had been dismissed three days before the trial of this cause (R. 97, 139). Both Cooper and Crocker testified that they had been made no promises in return for agreeing to testify as they did in this case (R. 111, 140), but Cooper stated that he was "hopeful o[illegible]me consideration" (R. 111). Both had signed waiver tolling the statute of limitations on assessment of their own income taxes for the fiscal years in question (Appendix, p. 6a, R. 256). Both testified to the fact that they had been convicted of perjury as a result of their prior statements about the matters in question (R. 97, 134).

After trial in which no other evidence was offered that petitioner, much less the corporation of which he was president, had received any part of the cash payments received by Cooper and Crocker, petitioner was found guilty and sentenced to a term of four years in the penitentiary (R. 210). On appeal, petitioner's conviction and sentence were affirmed (Appendix, p. 15a, R. 267).

REASONS FOR GRANTING THE WRIT

The scrim covering the questions presented is made up of the attempt by the Government to prove that petitioner received cash from Crocker and Cooper. That the Government's proof attempted no more is in itself fatal as the indictment charged willful evasion of income taxes owed by the corporation, not the evasion of taxes owed by petitioner personally. The frame of the indictment was necessitated not only by the fact that petitioner's income-tax returns corresponded with his net worth as determined in 1949, but also by the fact that the statute of limitations had run on any possible prosecution for understatement of petitioner's personal income in the crucial year. The only remaining vehicle for prosecution was the income of the corporation. With neither research nor proof both of the courts below assumed that if petitioner had received the illegal cash payments, the resulting income was corporate rather than personal. This assumption is without justification in the decided cases, in which payments received by a shareholder upon the sale of corporate property have been held to be corporate income only if all the shareholders consent to the taking. Thus, in the case of *Currier* v. *United States*, 166 F. 2d 346 (1st Cir. 1948), relied upon by the court below, the Court of Appeals for the First Circuit found it necessary to conclude that the shareholder in question was in effect the owner of all the corporate stock.[2] In the instant case,

[2] In Union Stock Farms v. Commissioner, No. 15783, 9th Cir., March 9, 1959 (59-1 U.S.T.C. ¶ 9317), decided after the decision below, it was held that corporate net income was increased even when *non-shareholder* employees, with the authorization of the president of a corporation, received and kept cash payments in addition to the invoice price of goods sold. While an argument can be made that corporate *gross* income should include such receipts, it is difficult to see how *net* income could be increased.

the Government did not attempt to prove that the owner of the remaining 50% of the shares had any inkling of the alleged transactions (R. 111, 142), or that the petitioner had any control over such remaining stock. The Government ignored this element of its case in spite of the fact that the Commissioner of Internal Revenue has acquiesced in a decision which held this element to be crucial. *Harry Sherin*, 13 T. C. 221 (1949), *acq.*, 1949-2 Cum. Bull. 1.

In *Sherin*, the petitioner corporation was a manufacturer of silk piece goods. Beginning in 1941 the corporation's non-shareholder sales agent, Biehl, began to accept cash payments in addition to the invoice price of the silk sold. This practice was followed with the consent of the corporation's president, one Berger, who was also a 50% shareholder. Ten per cent of the cash payments was retained by Biehl and 90% was turned over to Berger. Sherin, who was the corporation's secretary-treasurer and the owner of the other 50% of the shares, had no knowledge of this practice. On such facts the Tax Court held that the payments received by Berger did not constitute corporate income:

> "The corporation, as such, never authorized the illegal arrangements. It never received, directly

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Payments over invoice price can increase the corporate *net* income —which is of course the crucial figure in a tax-evasion case— only if such payments are retained in the corporate treasury or are treated as having been paid out as dividends, which are nondeductible. If a non-shareholder employee in such a case retains the cash payments he receives, the corporate net income is no more increased than is the net income of a night-club owner who permits his head waiter to negotiate with customers seeking ringside tables.

While the trial court below refused to give an instruction defining corporate income (R. 193), the Government did not proceed on the theory of the *Union Stock Farms* case.

or indirectly, any of the fruits of such transactions. Albeit Berger owned 50 per cent of the stock, Sherin owned an equal amount, and, on learning of Berger's action, he repudiated the illegal agreements. The corporate entity may not, in these premises, be disregarded. It has often been said that command over the income is a primary test of taxability. Here the corporation never had command over the illegal commissions. In accepting from Biehl 90 per cent of the excess payments, Berger acted for himself as an individual and not on behalf of Sherin, the other stockholder. Certainly it can not be said on the record here that he intended to act for the corporation, nor may any doctrine of estoppel be invoked to close the corporate mouth." 13 T. C. at 229.

Thus, the reasons for granting the writ, which are the conflicts created by and the completely erroneous nature of the decision below as to the criminal procedure that must be followed to obtain a valid conviction, also include the respectful suggestion that even in tax-evasion cases the proof must fit the charge in the indictment.

I

The Decision Below Affirming Petitioner's Conviction Despite the Fact That the Record Showed That the Statute of Limitations Had Run on One Count of the Indictment Is in Conflict With Two Decisions of the Court of Appeals for the Fifth Circuit.

On September 9, 1953, two days before the statute of limitations governing prosecution for evasion of corporate taxes for the fiscal year ended June 30, 1947, would have run, a complaint was allegedly filed with the United States Commissioner charging petitioner

with violation of Section 145(b) of the Internal Revenue Code of 1939 for the fiscal year in question (Appendix, p. 9a, R. 258, 259). The Government thereby attempted to take advantage of Section 3478(a) of the 1939 Code, which provides that the statute of limitations may be tolled by institution of a complaint before the United States Commissioner. Although the complaint was presented to the Commissioner on September 9, 1953, it was not transmitted to the Clerk of the District Court until December 10, 1953 (R. 221, 222), more than three months later, in spite of the injunction of Rule 5(c) of the Federal Rules of Criminal Procedure that such a complaint shall be transmitted "forthwith." The complaint was then misplaced and it was not entered in the docket in this case until April 15, 1958 (R. 222), that is, not until after petitioner had been tried and convicted.[3] Thus, when the case went to the jury the record showed that the statute had run when the indictment was found. The court below declared that this extraordinary irregularity did not vitiate the proceeding and that the statute of limitations had been effectively tolled. This holding is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit in *White* v.

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[3] The complaint is in the record filed with this Court only because it appears in a so-called supplemental record (R. 217-36) which the Government filed in the Court of Appeals. It does not appear in the record of the proceedings in the District Court and, since it had been misfiled in the Clerk's office, it could not readily have been located. Petitioner's motion in the Court of Appeals to strike portions of the supplemental record (R. 237) was never acted upon by that court.

The three-month delay of the Commissioner in transmitting the complaint to the District Court itself raises serious doubts as to whether the complaint was properly "instituted" before the statute had run.

United States, 216 F. 2d 1 (5th Cir. 1954), and *Flemister* v. *United States*, 260 F. 2d 513 (5th Cir. 1958), cases arising under the same statutory provisions as the instant case and presenting precisely the same issues.

In the *White* case the court had initially said that if the complaint had been filed in the record, judicial notice could be taken of it without the introduction of proof by the Government on this issue. On rehearing the court's attention was invited to the fact that the complaint was not part of the record in the case. As a result, the court reversed, holding that "it was necessary for the Government to prove by evidence properly introduced before the jury that a complaint was instituted before a Commissioner of the United States within the limitation period . . . ." 216 F. 2d at 8.

In the *Flemister* case the Government had made no attempt to show that the statute of limitations had been tolled by institution of a complaint. Moreover, it did not appear from the record that a complaint had been filed nor did it appear in the record that defendant had been notified of the complaint before indictment. The court, therefore, noted that at the time the case was submitted to the jury the Government had made no showing of facts sufficient to take the case from under the statute of limitations. The court thereupon held, as a matter of law, that the count of the indictment which the filing of the complaint had attempted to toll was barred by the statute of limitations. 260 F. 2d at 515-16, 518.

Although the court below was briefed on the fact that the indictment on its face showed that it had not been found within the statutory period, the Govern-

ment's failure even to attempt to prove the tolling of the statute was regarded as inconsequential. Before the petitioner could be convicted, however, the Government in the instant case was required to prove that the complaint had been instituted in sufficient time to toll the statute. This the Government made no attempt to do.

The court below further held that even if the statute had run, the conviction could be sustained on the ground that since the sentences for conviction on both counts of the indictment were equal in length and were to run concurrently, conviction under the second count was in and of itself sufficient to support affirmance of the conviction on both counts. It will be at once apparent that the court below erroneously relied on the rule that where a concurrent sentence does not exceed the maximum which lawfully may be imposed upon a single count, the judgment may be affirmed if the conviction on that count is valid. *Roviaro* v. *United States*, 353 U. S. 53, 63 n. 6; *Pinkerton* v. *United States*, 328 U. S. 640, 641-42 n. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85. This rule, however, is not applicable in this case, as the rule is predicated on a valid conviction under the separate and remaining count. See *Roviaro* v. *United States*, 353 U. S. 53, 68.

In this case, the barring of the first count destroys the validity of the conviction upon the second count because nearly all of the evidence before the jury concerned the fiscal year ended June 30, 1947, the fiscal year with respect to which the statute had run. Crocker's testimony was relevant only as to the barred year (R. 134, 135). Witness Segelbohm, whose testimony the Government used in an attempt to support the two admitted and convicted perjurers although he

had not seen the petitioner receive any money (R. 24), testified only as to events in the barred year (R. 23, 24). The only testimony left is that of Cooper, also a convicted perjurer. Thus, the barring of the first count makes most of the evidence before the jury improper and means that the conviction must be based solely upon the uncorroborated testimony of a single convicted perjurer. In addition it can not be stressed too strongly that this witness was indicted as a joint defendant with petitioner, but the indictment against him was dismissed upon the motion of the Government three days before the trial of this case. Clearly, no person may be subjected to loss of liberty on so flimsy an evidentiary basis when it is apparent that the jury relied on evidence which the barring of the first count of the indictment rendered improper. See *Yates* v. *United States*, 354 U. S. 298, 311-12. In the *Flemister* case, which, as shown by the previous discussion, is so similar to this one, the court, after holding one count barred by the statute of limitations, noted that it might well be prejudicial to the defendant to have the jury hear evidence concerning the barred year. For this, as well as for other reasons, the court reversed and remanded the case despite the Government's reliance on the concurrent-sentence rule.

The holding below on this point is clearly erroneous and is in conflict with the decisions of the Court of Appeals for the Fifth Circuit. This Court should grant certiorari to resolve that conflict.

II

The Decision Below That the Uncorroborated Testimony of Convicted Perjurers Was Admissible and Sufficient to Sustain a Conviction Is in Conflict With Applicable Decisions of This Court and Presents an Important Question of Federal Criminal Procedure.

The Court of Appeals, relying on a decision of its own and a decision of the Court of Appeals for the Second Circuit,[4] held that there was no error in receiving the testimony of Cooper and Crocker even though each of these witnesses had committed perjury with respect to precisely the same subject matter. It is apparent that this holding conflicts with the decisions of this Court in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh* v. *United States*, 352 U. S. 1.

In the *Communist Party* case, the Subversive Activities Control Board had ordered the Party to register as a "Communist-action" organization under the Internal Security Act of 1950. The Party appealed to the Court of Appeals for the District of Columbia. While the case was there pending, the Party moved for leave to adduce additional evidence on the ground that, subsequent to the Board's hearings, three of the witnesses upon whose testimony the Board relied had committed perjury. The Court of Appeals denied this motion and affirmed the order of the Board. This Court reversed:

> "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the pres-

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[4] United States v. Reina, 242 F. 2d 302 (2d Cir. 1957); Dean v. United States, 246 F. 2d 335 (8th Cir. 1957).

ent proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. . . .

". . . The purpose of this remand, as is its reason, is to make certain that the Board bases its findings upon untainted evidence. To that end it may hold a hearing to ascertain the truth of petitioner's allegations, and if the testimony of the three witnesses is discredited, it must not leave that testimony part of the record." 351 U. S. at 124, 125.

This decision did not leave it to the Board to conclude that the witnesses were telling the truth before the Board even though they had committed perjury in testifying about the same matters elsewhere. The trier of facts was not allowed the luxury of such guessing. This Court held as a matter of law that the testimony of these witnesses was discredited if they had previously perjured themselves in testifying about the same subject matter and that, if discredited, that testimony must not be left a part of the record.

The holding of the *Communist Party* case was reiterated less than six months later in *Mesarosh* v. *United States*, 352 U. S. 1. In that case, this Court ordered a new trial because the Government had relied in part upon the testimony of a "wholly discredited" witness. 352 U. S. at 9. This Court said that "the government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." 352 U. S. at 14.

In the instant case, it is a matter of record that the witnesses Cooper and Crocker had "committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings." Indeed, Cooper and Crocker stated that

they had done just that, and that they had been convicted for their false swearing. Under the holding of the *Communist Party* case, their testimony was "inevitably discredited" and the trial record tainted by its presence. This taint could not be removed merely by suggesting to the jurors that they take note of such falsehoods before returning a verdict based solely on the testimony in question. It was error to permit them to guess whether Cooper and Crocker had reformed. It was error to permit them to convict on the testimony of these witnesses because a conviction based on such evidence does not make the doing of justice "so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124.

By ignoring the *Communist Party* and *Mesarosh* cases, the court below did silently what some other federal courts have done explicitly.[5] It treated as meaningless this Court's rule that prosecutors in federal tribunals may not rely on the testimony of witnesses who have perjured themselves with respect to the same matters. In view of the misunderstanding of these two cases by the court below and some other fed-

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[5] United States v. Reina, 242 F. 2d 302 (2d Cir. 1957); United States v. Waldman, 160 F. Supp. 65 (D.N.J. 1958). Neither of these cases appears to have been concerned with witnesses who would be discredited as a matter of law under the *Communist Party* rule. Rather they dealt with witnesses who had apparently been shown only to have made inconsistent statements about the matters on which they testified. But each court indicated that the *Communist Party* and *Mesarosh* cases would not be applicable even if the witnesses demonstrably could not be relied upon to tell the truth as they saw it. These courts thus treated those cases as if this Court had remanded merely to permit counsel an opportunity for a more informed effort to impeach before the trier of fact.

eral courts, it is important that this Court give the necessary clarification.

In the event petitioner misconceives the rule in the *Communist Party* and *Mesarosh* cases, this Court has yet to determine the role of the perjurer in federal jurisprudence. Apart from these two cases, this Court has never considered whether the convicted perjurer is competent to testify in federal courts; whether, if competent in some cases, he is competent in all cases; whether, if competent in criminal cases, he is competent as a prosecution witness; whether, if generally competent as a prosecution witness, he is competent when clearly interested in the subject matter of his testimony; whether, if competent even in such a case, his uncorroborated testimony is sufficient to support a conviction.

In the federal courts, the abolition of the common-law rule disqualifying as witnesses those who had been convicted of infamous crimes came about through this Court's decision in *Rosen* v. *United States*, 245 U. S. 467. For the state courts, the abolition of that rule came about almost entirely through legislation. But, while the rule has been abolished in every state, ten of the forty-nine states have seen fit to make an exception.[6] That exception continues the common-law disqualification of convicted perjurers. If the Court did not consider the question in the *Communist Party* and *Mesarosh* cases, this Court has yet to decide

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[6] Ala. Code tit. 7, § 434 (1940); Fla. Stat. Ann. § 90.07 (1943); Md. Ann. Code art. 35, § 1 (1957); Miss. Code §§ 1692, 2315 (1956); N.D. Rev. Code § 31-0108 (1943); Pa. Stat. Ann. tit. 19, § 682 (1930), tit. 28, § 315 (1958); S.C. Code § 16-201 (1952); S.D. Code § 36.0105 (1939); Vt. Stat. tit. 41, § 8521 (1947); Vt. Stat. Ann. tit. 12, § 1608 (1959); Wash. Rev. Code §§ 5.60.040, 10.52.020 (1951).

whether either this exception to abolition of the common-law rule or the apprehensions behind it are to be given any recognition in the federal courts. This case raises that question. The question falls squarely within this Court's supervisory function with respect to criminal proceedings in federal courts, where certiorari jurisdiction is often exercised.

The reasons for limiting the common-law disqualification of infamous criminals are apparent. But it cannot be denied that removal of this disqualification has removed safeguards which were of considerable importance to defendants in criminal cases. And it cannot be denied that removal of the disqualification of convicted perjurers removes the most important of these safeguards, since conviction of perjury is peculiarly relevant to a determination of the reliability of a witness. Thus, one-fifth of the states have concluded that the difference between a conviction of perjury and a conviction of another crime is sufficient to justify the retention of the common-law disqualification of perjurers.

A strong argument can be made that the continued disqualification as witnesses of convicted perjurers is the most civilized rule. But even if the majority rule is followed and the blanket disqualification of perjurers rejected, we need not pretend that such witnesses are as reliable as others. Experience teaches that men who have little regard for the oath are very likely to testify falsely in cases such as this, in which they have a personal interest. This experience cannot be ignored. Moreover, it has long been a part of our jurisprudence that defendants in criminal cases are entitled to acquittal unless guilt is established by an extraordinary standard of proof. Even if perjurers are held compe-

tent as witnesses in civil cases, it does not follow that they are competent, particularly as prosecution witnesses, in criminal cases. And even if the perjurer's testimony should be held admissible in every case, it does not follow that a verdict of guilty can be based on such testimony *alone*.

To permit the petitioner's conviction to stand upon the uncorroborated testimony of Cooper and Crocker would be barbarism. Not only are these gentlemen convicted perjurers. They were also indicted as co-defendants and accomplices in the crime about which they testified, and the reward for their testimony was dismissal of the charges against them.[7] They were also clearly interested in establishing that the income from the cash payments in question did not belong to them, since their own tax liability for the years in question had not yet been settled.

It is now settled in the federal courts that the uncorroborated testimony of an accomplice is sufficient to support a conviction. *Caminetti* v. *United States*, 242 U. S. 470. The rule in nearly half the states is otherwise by statute, 7 Wigmore, Evidence, § 2056, p. 319 (3d ed. 1940), in recognition of the danger that an alleged accomplice to an alleged crime will testify falsely to place the blame on others in the hope of receiving lenient treatment for himself. Thus, even if Cooper and Crocker were accomplices and no more, one-half of the states would hold that a conviction could not be based on their uncorroborated testimony. This Court has made the contrary judgment. But it should not

[7] It is worthy of repetition that the charges were dismissed only three days before the trial of the petitioner, a circumstance which strongly suggests that pressure had been used by the prosecution to induce these witnesses to testify as they did.

carry that judgment over to a case in which the witnesses in question possess several characteristics that point strongly to unreliability. To permit a conviction to stand based on the uncorroborated testimony of men who have *both* motive and propensity to lie under oath would be to disregard all experience.

This Court, indeed, has already expressed its distaste for such a result. *Hammer* v. *United States*, 271 U. S. 620. That case decided that the "two witness" rule should be applied in cases of subornation of perjury. Mr. Justice Butler, speaking for a unanimous Court, did not hesitate to express his wonder that a conviction for subornation could have been obtained below upon the unsupported testimony of the alleged subornee:

> "Here the sole reliance of the Government is the unsupported testimony of one for whose character it cannot vouch—a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited." 271 U. S. at 628.

In *Sykes* v. *United States*, 204 Fed. 909 (8th Cir. 1913), the Court of Appeals for the Eighth Circuit unanimously reversed a conviction based primarily on the testimony of one of the principals in the crime who was known to have sworn falsely about it. The opinion of that court could almost have been written with the facts of the instant case in mind:

> "[T]he uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by a hope of immunity from punishment, which in this case has since turned to glad fruition,

> that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but . . . it presents no substantial evidence of it." 204 Fed. at 913.

Prosecutors must not be permitted to obtain convictions on *any* evidence—no matter how shabby—which they consider relevant. There must be some point at which those trained in the law will say that a jury of laymen shall not convict solely on the basis of testimony whose source is demonstrably unreliable. Surely Judge Perry was correct when, in *United States* v. *Haderlein*, 118 F. Supp. 346 (N. D. Ill. 1953), he held that the uncorroborated testimony of an alleged co-conspirator who was also an admitted perjurer "does not constitute such evidence as would warrant a jury or a court finding the defendant guilty of an offense beyond a reasonable doubt." 118 F. Supp. at 348.

The court below in effect held that such a point does not exist. The instant case thus presents clearly the question whether the experience of the legal profession must be entirely ignored and prosecution officials given free rein to obtain convictions upon evidence from demonstrably unreliable sources. This is an important question in the administration of criminal justice, and it is a question worthy of the deliberations of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,000

ADOLPH C. BURGER, also known as A. C. BURGER and ANDY BURGER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Missouri.

[February 2, 1959.]

Don O. Russell (William A. Eno was with him on the brief) for Appellant.

Murry L. Randall, Assistant United States Attorney (Harry Richards, United States Attorney and W. Francis Murrell, Assistant United States Attorney were with him on the brief) for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, Circuit Judge.

Adolph C. Burger and Carlisle Cooper were indicted on December 18, 1953, in two counts for wilfully and knowingly attempting to defeat and evade a large part of the taxes due and owing by Andy Burger Motors, Inc., a corporation, for the fiscal years ending June 30, 1947, and June 30, 1948, respectively, by filing false and fraudulent tax returns of the corporation for those years, all in violation of 26 U.S.C. § 145(b), Internal Revenue Code, 1939. The indictment charged that the net income returned by the corporation for the first period was $472,672.26, whereas it was $614,744.59, and that the tax returned was $179,615.46 and it was $233,602.94; that the net income returned for the second period was $312,636.82, whereas

it was $351,607.19, and that the tax returned was $118,334.38, whereas it was $133,143.07.

Prior to the trial the indictment was dismissed as to defendant Cooper who was called to testify by the government. Defendant Burger had a jury trial on his plea of not guilty, was convicted on both counts of the indictment, and sentenced to four years imprisonment. He appeals.

There was substantial evidence from which it could be fairly inferred that:

Andy Burger Motors, Inc., was incorporated on July 1, 1946, and at all relevant times was engaged in the business of selling and servicing automobiles. Its capital stock belonged to defendant Burger and his wife; one share was issued to Carlisle Cooper, but it was endorsed back to Burger. Burger was president and closely supervised and controlled the operation of the corporation business. Acting for the corporation, he employed Carlisle Cooper as its general manager in charge of sales and service at its plant on South Grand Street in St. Louis, and Munson Raymond Crocker as its general manager of Community Motors, operated as part of the capital structure of Andy Burger Motors, Inc., for the first four months of the indictment period, on Natural Bridge Avenue in that city. Cooper also became vice president of the corporation though he had no financial interest in it. Both Cooper and Crocker worked a long time under Burger in the enterprises he controlled. Crocker was so employed some twenty-four years and Cooper at least eight.

Late in 1945 and early in 1946, when OPA ceiling regulations were in effect, Cooper was employed in an automobile sales and service business controlled by Burger. Sometime during that period Burger discussed with Cooper the practice of making out false invoices to evidence the sale of cars, and of falsifying the entries in the corporation's books that were derived from the invoices, by showing smaller prices for the cars sold than were actually obtained for them from the purchasers on the sale. It was said that others were doing it and Burger instructed

Cooper to follow the practice in their business and agreed that Cooper would be paid ten per cent of the excess money so obtained over the false price stated in the invoice. Burger instructed Cooper to deliver the money received from sales of cars in excess of the price stated in the invoice to him and to keep an account of the sales made on that basis so that Burger "* * * would know what the transactions were and what they covered". The books of the corporation based the amounts of its receipts from the sales of cars upon the amounts stated in the invoices, so that the false invoices produced false amounts, shown as received, from sales of cars on the corporation books.

Pursuant to Burger's instructions, Cooper made sales of cars and issued false invoices which were delivered to the purchasers and to the corporation bookkeeper showing the sale price to be less than the money obtained on the sale. The OPA ceiling prices were removed in November, 1946, some four months after the incorporation of the Andy Burger Motors, Inc., and thereafter Burger directed Cooper to continue the practice of making sales at prices above the prices stated in the sales invoices. He told Cooper: "It was the way we set up our books and if we change now we will disclose what we have done before". The selling of cars by the corporation at prices in excess of the prices shown on the false invoices was accordingly continued consistently throughout the two year indictment period. The amounts of the payments that were in excess of the amounts shown on the invoices were always collected in cash money. Cooper was provided with small books containing perforated detachable sheets arranged so that the entries made on a page of the book would be copied with carbon onto the next sheet. In the regular course of sales made at prices above invoice prices, Cooper would enter a memorandum of the real transaction in the small book, sufficient to identify it with the corresponding corporation stock number and sale records and also the amount of cash money in excess of the invoice price received from the sale. He made these entries at the time of the transactions; in his office at the place of business of Andy Burger Motors, Inc., and in many cases in the presence of

the purchasers, some of whom swore to seeing him do it. The entries fill nearly eleven books. They show cash received over the false invoice price during the two indictment years on 941 cars; such cash overage received during the first year amounting to $161,602.69 and during the second year to $60,651.00—both amounts being greater than the amounts of insufficiency in the tax returns of the corporation for the respective years covered in the indictment.

In obedience to Burger's instructions, Cooper turned over to Burger all of the money received on account of excess charged for the cars over the invoice price. Burger then paid him ten per cent of such money as he had agreed to do. With the delivery of the cash to Burger, Cooper detached from the books and delivered the original entries, which contained the account of the sale producing the money, to Burger in compliance with Burger's request. Cooper retained the copy sheets in the books in his own possession. They were identified and the entries therein were fully explained by Cooper on the witness stand. They were received in evidence and are included by reference in the record here.

Munson Raymond Crocker was general manager of another automobile sales and service agency, called Community Motors Company, which was part of and operated within the capital structure of Andy Burger Motors under the supervision and control of defendant Burger. Crocker received the same directions from Burger as Cooper had received; to follow the practice of charging an additional cash amount over a false invoice price in the sale of cars. The direction was given in late 1945 or early 1946 and the practice was followed under Crocker's management until the Community Motors Company was taken out of the capital structure of Andy Burger Motors, Inc., in November, 1946. Crocker continued the practice until 1948. The agreement between Burger and Crocker was that Crocker should be paid ten per cent of the excess cash received over invoice price of cars sold and Crocker was to give the remaining ninety per cent to Burger. Copies of the false invoices were turned over to the bookkeeper

and the books were kept in accord with them. Crocker did not keep a record of the sales made under his management of the cash received from them in that manner. He had been longer in responsible employment under Burger than Cooper and Burger did not require him to keep account of the excess moneys he received. He was constrained to testify from memory. Crocker accounted to Burger from time to time throughout the indictment period for all the cash received on the sale of cars above the invoice price and paid over ninety per cent of it to Burger and kept ten per cent. He swore that to the best of his recollection about 75 per cent of the corporation's new cars sold under his management had "trade-ins", and that cash over and above invoice price was obtained on the sale of about seventy-five per cent of the used cars. The estimates given by Crocker on the witness stand and the estimates of customers, who had bought from the agency under his management in accordance with the described practice, established that large amounts of cash consideration for cars were not disclosed by the corporation's books, or invoices, or included in the corporation income tax returns, but were effectually concealed.

In consequence of the practice carried on under Burger's directions, the tax returns of Andy Burger Motors, Inc., were made up in each of the indictment years from the false invoices and wrongfully omitted that portion of the price that was received over invoice prices.

Each of those tax returns was signed and filed by defendant Burger, president of the corporation.

Carlisle Cooper, Munson Raymond Crocker, and defendant Burger were questioned by Internal Revenue agents concerning the practice of falsifying the invoices and the corporate books and the tax returns. They made denials of having engaged in the practice and made detailed statements exculpating themselves. Cooper and Crocker were prosecuted in federal court for their perjury.

Cooper plead not guilty and stood trial. Burger's attorney was employed to defend him and Cooper was given

to understand that Burger would take care of the attorney's fee, which he did. A transcript of the proceedings was delivered daily to their attorney during the trial of Cooper, and Burger and Cooper had conversations in which the thought was mutually expressed that the government had not produced any evidence in court and they felt they had a good chance of winning.

Cooper was convicted and his conviction was affirmed on appeal. *Cooper* v. *United States*, 8 Cir., 233 F.2d 821. He was subjected to imprisonment. Thereupon Burger agreed to see that Cooper's wife "got along while he was gone". He also provided a salary of $550.00 a month for Cooper during his imprisonment and as soon as that ended he took Cooper back in the employment of Andy Burger Motors, Inc., at a thousand dollars a month. Cooper gave Burger some promissory notes signed in blank and also a deed of trust on his home in connection with the large sums of money Burger advanced for him after his arrest, but Cooper was never called on to make any payment on the notes. Cooper was under fidelity bond to the corporation in the sum of $25,000, but Burger brought no action to recover on that bond.

Crocker did not stand trial, but plead guilty to the false swearing, in the matter of the false invoices and concealment of consideration received for cars sold, before the Internal Revenue agents and was sent to prison. While there, Burger caused him to be paid $550.00 a month, and after his prison term expired took him back into his employ at a thousand dollars a month. Crocker also was under fidelity bond to the corporation which was never sued on.

Neither Cooper, nor Crocker, nor Burger included any amounts in their tax returns for the indictment years on account of the amounts received during the period as consideration for the cars sold for more than invoice prices. But Cooper and Crocker have since signed waivers for the government and investigation of the amounts of tax chargeable against them for the period was being made at the time of this trial.

A great many of the corporation's sales of cars for amounts above the prices shown on false invoices were made to dealers who resold the cars. All of such dealers confirmed that they had bought cars from the corporation and the companies included in its capital structure on that basis during the indictment years.

One of such dealers was Montgomery Motor Sales which bought several hundred cars in that way from Andy Burger Motors, Inc., and its agencies during the period. Three of the Montgomery officials so testified. Elbert Montgomery also explained that his company followed the same plan of issuing its invoices to its purchasers showing certain prices received and keeping its books in accord with such invoices, but actually receiving and collecting cash additional to that price not shown by the books. During the original investigation of Andy Burger Motors, Inc., by the Internal Revenue officers Cooper felt unsure about what the entries in Montgomery's books might show as to such sales made to it. The Montgomery Company had not originally been a customer of his and he had come to deal with them only after discussing them with Burger who had known them previously. After conferring with Burger, Cooper went to the Montgomery place of business and checked their books and found they did not record the cash paid by them for cars bought from Andy Burger Motors, Inc., in addition to the prices shown on their sale invoices. Cooper then took Elbert Montgomery to see Burger. They met him in a certain alley adjacent to Burger's so-called A.B.C. store in St. Louis. Cooper did not stay with them during their interview. He merely stated to Burger at the outset that Montgomery had not signed anything for the Internal Revenue agents who had been to see him and walked away and did not hear what they said. Their interview lasted ten or fifteen minutes. Montgomery swore it was merely a friendly argument about whether the Cadillac he was driving, or the Lincoln Burger drove, was the better car. Nothing else. Burger testified (somewhat contradicting his testimony elsewhere that he "did no selling of cars") that he only "wanted to see Montgomery about selling him some Lincoln cars * * *".

The defendant Burger testified at length in his own behalf. He denied giving any instructions to Cooper or to Crocker to make sales of corporation cars at prices over the invoice prices and declared that he had no knowledge, at the time of signing the Andy Burger Motors, Inc., tax returns, of any sales being made on that basis under the management of either of them. He had been inquired of by Internal Revenue agents and had made the denials to them. He declared that neither Cooper nor Crocker had ever delivered to him any money obtained in that manner and that he had never seen the record of sales made at over invoice prices in the books kept by Cooper until copies were shown to him shortly before the trial of this case. He made inquiry of the corporation's "various personnel", including Cooper and Crocker, but "was unable to find any evidence that any sales had been made in that way". He "opened all the books and records of Andy Burger Motors, Inc., to investigating Internal Revenue officers". He first came to the belief that Cooper and Crocker had made sales and received money on them, in excess of invoice prices, after Cooper's trial on the perjury charges against him, and after Crocker had plead guilty to the charges against him.

At the close of all the evidence motion for directed verdicts in defendant's favor was presented and denied.

Appellant contends for reversal that the court erred: (1) in failing to find that the first count of the indictment was barred by the Statute of Limitations; (2) (a) in receiving the evidence of Cooper and Crocker who had been convicted of perjury and made false invoices; (b) in receiving the books of account maintained by Cooper; (c) in receiving the evidence of transactions prior and subsequent to the indictment period; (d) in receiving estimates of certain witnesses of overage cash amounts claimed to have been paid by purchasers of cars; (3) in giving and failing to give certain instructions; (4) in making prejudicial remarks in the presence of the jury; and (5) in denying defendant's motion at the close of the evidence for acquittal for insufficiency of evidence.

I.

The indictment alleged that the offense occurred on September 11, 1947, which was the day the defendant caused the corporation's tax return to be filed. A complaint charging the defendant Burger with having committed the same offense alleged against him in the indictment herein was filed with the proper United States Commissioner on September 9th, 1953, and a warrant was issued thereon and served on defendant, who waived hearing and was released on bond. The Statute of Limitations was six years as provided in Title 26 U.S.C. § 3748 (1939), but the same section extends that period, where a complaint charging the offense has been filed, until the discharge of the grand jury at the next session within the district. *Zacher* v. *United States,* 8 Cir., 227 F.2d 224-225.

The indictment herein was returned on December 18, 1953, by the same grand jury which was in session at the time the complaint was filed. Although the action of the Commissioner before whom the complaint was filed was duly transmitted to the clerk of the district court, it became misfiled in another file of a case entitled *United States* v. *Burger.* During the trial of this case Burger attacked the sufficiency of the complaint filed with the Commissioner to toll the statute beyond the six years on the ground that the complaint did not charge the same offense against him as is set forth in the indictment. The court properly denied the motion. The point was without merit and has not been argued here. A point is made here however that the statute was not tolled because of the misfiling which occurred in the clerk's office. It is equally without merit. No prejudice of any kind was occasioned defendant by the misfiling. The statute was satisfied by the transmittal of the record to the clerk's office where it was available to defendant and as stated, it was used by defendant on his trial.

In addition, since appellant was given concurrent sentences, the second count is sufficient to sustain the judgment appealed from. *Hulahan* v. *United States,* 8 Cir., 214 F.2d 441, 442 and cases cited there; *Schumacher* v. *United States,* 8 Cir., 216 F.2d 780, 783.

II.

(a) There was no error in receiving the testimony of defendant's long time associates in business, Cooper and Crocker, on account of their having sworn falsely (as they admitted) in favor of themselves and the defendant to the revenue agents. Their credibility was solely for the jury. *Dean* v. *United States*, 8 Cir., 246 F.2d 335, 336; *United States* v. *Reina*, 2 Cir., 242 F.2d 302, 307.

The fact that they were accomplices with defendant in his attempt to evade taxes presented no reason to exclude their testimony. "It has been held over and over again that in the federal jurisprudence a conviction may depend upon the uncorroborated testimony of an accomplice." *United States* v. *Reina*, supra, 242 F.2d at 307;[1] *Haakinson* v. *United States*, 8 Cir., 238 F.2d 775, 779, and cases cited there.

(b) The books in which Cooper kept accounts of a class of sales of corporation cars made under his management were properly received in evidence. They were kept by the general manager at the direction of the president of the corporation and the entries were made at the place of the business, at the time of the transaction, and in the regular course of the business transacted. The indictment years begin with the last page of the first book and, as stated by the prosecution without dispute, they show cash overages during the indictment years on some 941 cars. A count shows that on 805 of those cars, mostly used cars, the books show the date, name of purchaser, Andy Burger Motors, Inc. stock number, invoice price and cash overage. On 136 new cars the books only show one figure, one or two names, and date. Cooper testified that in such cases the name was either the purchaser's or an intermediary who paid him the cash or both and that the figure represents the cash. On 80 of these 136 cars the books also contain the word "over" or "overage". The accountant was able, from the books alone, to tie in all but 26 of the cars with the records of Andy Burger Motors,

[1] There are exceptions shown in the text cited but they are not relevant here.

Inc. Cooper testified that 5 of these 26 were sold by him for another Burger business, Burger's father, and a Burger employee. The cars which the accountant found in the invoices of Andy Burger Motors, Inc., are listed, with information from the invoices, in the order in which they appear on the Cooper records and in the record of exhibits. They were clearly books kept in the ordinary course of business for business purposes. *Smith* v. *United States*, 8 Cir., 236 F.2d 260, 265. Certiorari denied, 352 U. S. 909; *United States* v. *Brewster*, 2 Cir., 231 F.2d 213, 214; *Bodnar* v. *United States*, 6 Cir., 248 F.2d 481, 482; *Leathers* v. *United States*, 9 Cir., 250 F.2d 159, 160-162; *United States* v. *Mortimer*, 2 Cir., 118 F.2d 266, 270. Certiorari denied, 341 U.S. 616; *McFee* v. *United States*, 9 Cir., 53 F.2d 553, 554. Certiorari denied, 285 U.S. 546. Moreover, as they were made by Cooper at the request of the defendant Burger, they were also admissible for that reason, and Cooper who made them could explain them. *McFee* v. *United States*, supra, 53 F.2d at 553—further, they were admissible because Burger was given a copy of them. As this Court stated in *Smith* v. *United States*, supra, 236 F.2d at 266: "The admissibility of records and entries made in the regular course of business is today unquestioned. *United States* v. *Mortimer*, 2 Cir., 118 F. 2d 226, certiorari denied, 314 U.S. 616, 62 S.Ct. 58, 86 L.Ed. 496. This is especially true in United States Courts. 28 U.S.C.A. § 1732.". There was no error in receiving them in evidence.

(c) The point that the court erred in receiving evidence concerning the beginnings of defendant's practice of falsifying the corporation's records of amounts received from its sales of cars before the indictment period is without merit. The government did not go into the figures or amounts prior to the indictment period, but it was proper and necessary to an understanding of the case to show that the charged attempt to evade tax was not an isolated act, but that defendant's intent was to evade by means of a practice or course of conduct. There is some argument for defendant that it was begun only to avoid OPA ceilings, which would be irrelevant if the intent to

evade was also present. The court was not in error in receiving the evidence of Burger's instructions at the beginning of the practice and following it up by taking and concealing the income during the indictment period. No testimony as to his conduct prior to the offense was received that did not tend to prove his intent to defeat and evade the corporation's tax as charged in the indictment. See *Bedell* v. *United States*, 8 Cir., 226 F.2d 585, 589; *Giardano* v. *United States*, 8 Cir., 251 F.2d 109, 115; *Hoyer* v. *United States*, 8 Cir., 223 F.2d 134, 138.

Burger's conduct toward Cooper and Crocker after he had made the corporation tax returns, and the Internal Revenue investigations had begun, was clearly admissible as showing consciousness of guilt and criminal intent. See *Luthran* v. *United States*, 8 Cir., 93 F.2d 395, 399; *Bruce* v. *United States*, 8 Cir., 73 F.2d 972, 974; *Segal* v. *United States*, 8 Cir., 246 F.2d 814, 818; *Green* v. *United States*, D.C. Cir., 259 F.2d 180, 182. Indeed, a large part of defendant's own testimony concerned his own conduct during and after the investigation begun by revenue agents.

(d) Dealers, who paid cash over invoice price, and Cooper and Crocker were all permitted to give their estimates as to amounts of money that were received from some sales of cars over the amounts shown by the invoices of the sales, when that was the best evidence available. In view of the proof that the corporation's records of the amounts were false, there was no better evidence to be had in some instances than the recollection of the witnesses. There was no error in receiving their best recollection concerning amounts. They did not draw them out of the air. They had been deeply concerned and knew whereof they spoke. It was for the jury to appraise their testimony. They had known the exact amounts at the time of the transactions and we find no error in allowing their testimony. Further, the government was not obliged to show the exact amount of tax evaded. *Gleckman* v. *United States*, 8 Cir., 80 F.2d 394, 399-400; *Beard* v. *United States*, 4 Cir., 222 F.2d 84, 89, citing *United States* v. *Johnson*, 319 U.S. 503, 517-518, 63 S.Ct. 1233, 87 L.Ed. 1546.

III. —

Appellant contends that the court erred in failing to instruct the jury, as requested, to the effect that "if the corporation did not authorize Carlisle Cooper and Munson Raymond Crocker to receive [the cash payments they received over the invoice prices] and did not ratify the receipt thereof" that "said payments were not corporate income" and it is argued that the judgment should be reversed on account of the error.

But there was no occasion for the court to give an instruction in that form to confuse the jury. In order to show that Cooper and Crocker were authorized to sell the corporation's cars, as they did, so as to receive the cash payments they received over the invoice price for the corporation's cars, the government relied on the evidence that defendant Burger, president of the corporation in full control of its business, at its places of business, was the one who directed the transactions. He denied it and said he had no knowledge of any of the transactions and never got any part of the proceeds. The issue contested before the jury trying Burger was, therefore, whether or not he did have knowledge and understanding of and authorized and directed the sales as Cooper and Crocker made them. That was the issue to which the court directed itself and instructed, fully and clearly; that it was necessary, in order to convict Burger, to establish beyond reasonable doubt defendant's knowledge and understanding of all the essential elements of the offense; all of which were fully explained; and that he made omissions in his corporate tax returns wilfully and knowingly and with intent to evade and defeat a tax that he knew to be owing.

Corporations act only through their agents and if Burger knew of and directed the sales of the corporate property as made, he could not exclude the consideration received on the sales from his return of the corporate income. Even if taking part of the consideration by Burger, Cooper and Crocker could be regarded as stealing or embezzling or receiving constructive dividends, the taking was from the corporation. First it was income to the corporation.

Pertinent declaration was made by the First Circuit in *Currier* v. *United States*, 166 F.2d 346, where the defendant took to his own use remittances sent to his family corporation, of which he was the president, in payment of goods sold by it, and failed to make tax return in respect to the remittances taken, either for himself or for the corporation. The indictment under 145(b) was against both the corporation and its president and the court summarized its conclusion in the final paragraphs of its opinion (166 F.2d at 348) as follows:

> "In short the case is one of an individual attempting to evade taxes on himself and on his corporation. No purpose would be served by a further review of the evidence or the defendant's contentions.
>
> "The judgments of conviction were proper and are affirmed."

We find no error, either in instructions given or those refused.

IV.

The defense naturally expressed horror at the perjury proven against witnesses Cooper and Crocker which each of them disclosed early in his testimony. Naturally the entries made by Cooper, concerning the sales of each of 941 cars, and the numerous reported interrogations of him, also opened a very wide field for cross-examination of him in this case. It was liberally availed of by defendant. Complaint is made here because the court expressed the hope during the trial that counsel would not " * * * find it necessary to go over every statement * * * " Cooper made and that counsel could " * * * limit [the] cross-examination [as to the perjury] to some degree to conserve the time of the Court and jury". No exception was taken to the court's remark and it was made with such respectful courtesy and consideration towards counsel that none could be taken. See *Adams Dairy Company* v. *St. Louis Dairy Company*, 8 Cir., 260 F.2d 46, 55-56 and cases cited there. Counsel was not in any way limited in the cross-

examination. The court's remarks present no ground for criticism or reversal of the judgment.

V.

Substantial evidence supports the verdict.

We find the judgment to be without error.

Affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,000

ADOLPH C. BURGER, also known as A. C. BURGER AND ANDY BURGER, *Appellant*,

v.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Adolph C. Burger, also known as A. C. Burger and Andy Burger, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

February 2, 1959.

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No. 800

In the Supreme Court of the United States

OCTOBER TERM, 1958

ADOLPH C. BURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
CHARLES K. RICE,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	7
Conclusion	14

CITATIONS

Cases:	
Communist Party v. *Subversive Activities Control Board*, 351 U.S. 115	10
Cooper v. *United States*, 233 F. 2d 821, certiorari denied, 352 U.S. 837	4
Currier v. *United States*, 166 F. 2d 346	9
Drybrough v. *Commissioner*, 238 F. 2d 735	9
Flemister v. *United States*, 260 F. 2d 513	11
Haakinson v. *United States*, 238 F. 2d 775	11
Kann v. *Commissioner*, 210 F. 2d 247, certiorari denied, 347 U.S. 967	9
Mesarosh v. *United States*, 352 U.S. 1	10
Sherin v. *Commissioner*, 13 T.C. 221	9
Simon v. *Commissioner*, 248 F. 2d 869	9
Union Stock Farms v. *Commissioner*, decided March 9, 1959 (59-1 U.S.T.C., ¶9317)	9
United Mercantile Agencies, Inc. v. *Commissioner*, 23 T.C. 1105	9
United States v. *Keenan*, decided March 26, 1959 (1959 A.F.T.R., ¶59-527)	12
United States v. *Reina*, 242 F. 2d 302	11
White v. *United States*, 216 F. 2d 1	11
Statutes:	
Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):	
Sec. 145(b)	2, 3
Sec. 3748(a)	2, 12

804081—59——1

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 800

ADOLPH C. BURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–15a) is reported at 262 F. 2d 946.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1959 (Pet. 15a). A petition for rehearing was denied on February 26, 1959. The petition for a writ of certiorari was filed on March 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether, where a timely complaint was filed to toll the running of the statute of limitations, prosecu-

tion on an indictment thereafter entered was barred because the clerk of the district court placed the complaint in the wrong file and did not transfer it to the proper file until, after the conclusion of the trial, the point was first raised by petitioner.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

SEC. 3748. PERIODS OF LIMITATION.

(a) *Criminal Prosecutions.*—No person shall be prosecuted, tried or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

* * * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

* * * * * * *

* * * Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

* * * * * *

STATEMENT

On December 18, 1953, petitioner and one Cooper were indicted in the United States District Court for the Eastern District of Missouri, Eastern Division, for having wilfully attempted to defeat and evade a large part of the taxes of Andy Burger Motors, Inc., for the fiscal years ended June 30, 1947, and June 30, 1948, by filing and causing to be filed false and fraudulent tax returns, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of corporate net income and tax liability reported on the returns, as compared with the true amounts, were alleged to be as follows (R. 1–2):

Fiscal year ending	Net income		Tax liability	
	Reported	Corrected	Reported	Corrected
June 30, 1947	$472,672.20	$614,744.57	$170,615.46	$233,602.94
June 30, 1948	312,636.82	351,607.19	118,334.38	133,143.07

After a jury trial petitioner was found guilty on both counts (R. 215). On April 18, 1958, the trial judge imposed concurrent four-year prison sentences on each count (R. 210). The judgment was unanim-

mously affirmed by the court of appeals (Pet. 1a-15a).

Prior to trial, the indictment was dismissed as to the defendant Cooper (R. 12, 97), who had already served a prison sentence for perjury arising out of his denials to Treasury agents in 1952 that he or Andy Burger Motors, Inc. had ever received money from automobile purchasers in excess of the invoice price (R. 97; *Cooper* v. *United States*, 233 F.2d 821 (C.A. 8th), certiorari denied, 352 U.S. 837). A similar indictment involving another Burger agency was dismissed as to the witness Crocker (R. 139), who had also served a prison term after pleading guilty to perjury charges (R. 134, 137).

The evidence to support the verdict may be summarized as follows:

Petitioner and his wife owned all of the outstanding stock of Andy Burger Motors, Inc. (hereinafter referred to as the corporation) (R. 14, 15, 103). Petitioner was president and Cooper was vice-president and the active manager (R. 14, 15, 102, 159). Two lesser Burger auto agencies were operated as part of the corporation and one of them, Community Motors, was managed by Crocker (R. 14, 134, 157). Petitioner closely supervised the management activities of Cooper and Crocker (R. 103, 171).

The books of the corporation, which were in agreement with the tax returns, included in income only the invoice price of new and used cars sold, and it followed that income had been understated on the returns to the extent of any income received in addition to the invoice price (R. 174). Most of the used

cars obtained by the corporation as trade-ins on new cars were sold to dealers (R. 81, 136). All of these dealers testified that they paid Cooper or Crocker cash over and above the invoice price for virtually all of the used cars. This practice was followed at all three Burger agencies (R. 114, 118, 119, 127, 131). On a few of the new cars, where a trade-in of a used car was not involved, the purchaser also paid cash in addition to the invoice price (R. 82, 141). Seven individuals testified with respect to such payments, including one purchaser who stated that petitioner himself had told him that in order to get two cars he would have to pay Cooper $700 in addition to the invoice price, which the purchaser did (R. 24, 26, 113, 121–126, 132). Another purchaser testified that he had first consulted petitioner, who had advised him that any deal he and Cooper could agree upon was all right with petitioner, and that he had paid Cooper $1,700 in currency over the invoice price (R. 121). The other five new car purchasers had dealt exclusively with Cooper (R. 26, 113, 122–125, 132).

Cooper testified that late in 1945, pursuant to instructions from petitioner, the agency initiated the practice of exacting from purchasers of automobiles, then a scarce commodity, cash payments over and above the invoice price (R. 80–81, 102–103); that the practice continued until late in 1948 or early in 1949, and applied to between 75% and 90% of the used cars and about 10% or 15% of the new cars sold (R. 81–82); that petitioner got 90% of the currency and Cooper, 10%, in accordance with their agreement

(R. 82); that none of the cash went to the bookkeeper or was placed on the books of the company (R. 85–86, 91, 103);[1] and that, pursuant to orders from petitioner, he (Cooper) had kept records of the cash overages (R. 82). Cooper produced his memorandum book records of the many hundreds of transactions in question, explaining that the original of each slip had been torn out and given to petitioner at the time the money was turned over to him, and that the carbon copies remained bound in the memorandum books (R. 82–83, 96, 105, 109, 112).[2] The total unreported cash overages disclosed by Cooper's books were $161,602.69 for the first fiscal year, and $60,651 for the second fiscal year (R. 147). Cooper further stated that while he was serving the prison term on his conviction for perjury (*supra*), he was receiving his base salary of $550 a month; that when he was released petitioner raised it to $1,000 a month; and that he continued to work for petitioner until about three weeks before the trial (R. 79–80).

Crocker testified that he had been manager of Community Motors; that between early 1946 and early 1948, pursuant to instructions from petitioner, he had followed the practice of exacting cash premium payments in addition to the invoice price of cars (R. 134–136); that he had received cash overages on about 75% of the used cars (R. 136); that he had had sev-

[1] The bookkeepers verified the fact that they had never been given any of the under-the-table money, and that it did not appear on the books (R. 16–19).

[2] Two witnesses saw Cooper make such entries (R. 115, 118).

eral conversations with petitioner to the effect that the Government could prove nothing on them (R. 136); that none of the cash overages had gone to the bookkeepers (R. 142); and that Crocker had given petitioner 90% of the overages and retained 10% for himself, pursuant to their agreement (R. 137, 140–141). Crocker testified further that he had entered a plea of guilty to a perjury charge, having previously given false testimony before the Treasury agents by denying the receipt of the cash overages; that while he was serving his prison sentence he was receiving his base salary of $550 a month; and that when he was released petitioner raised it to $1,000 a month (R. 134–135, 137).

Petitioner, testifying in his own defense, denied that he had ever asked or received cash in excess of the invoice prices, and stated that Cooper and Crocker had been instructed to charge the "Ford suggested delivery price" (R. 160, 162, 169, 171). Petitioner admitted that the cash overages were not reported as income on the corporation's returns or on his individual tax returns, and claimed the reason was that he had not received the money (R. 162, 171). Petitioner insisted that he had never heard about any such payments until 1949 (R. 162), and that it was not until after Cooper was convicted of perjury and Crocker pled guilty to perjury that he came to believe that they had actually accepted such payments (R. 170).

ARGUMENT

1. Petitioner's principal argument (Pet. 7–9, 14–21), that the evidence was insufficient to support the

verdict, is plainly without merit. There was direct testimony by the purchasers of automobiles that they had made the over-invoice payments to Cooper and Crocker, the active managers of the corporation's sales agencies; and testimony by Cooper and Crocker that they had paid 90% of the overages to petitioner, who controlled the corporation (*supra*, pp. 5–7). The cash overages collected by Cooper alone during the two prosecution years exceeded $222,000, none of which was recorded on the corporate books or reported as income on the corporation tax returns or petitioner's individual tax returns (*supra*, pp. 6, 7). Against this overwhelming proof the jury found petitioner's denials of receiving the money (*e.g.*, R. 171) incredible, and returned a verdict of guilty. Petitioner's attack in this Court on the sufficiency of the evidence is dual: (a) that the funds in question were not shown to be income to the corporation in the absence of proof that petitioner's wife, who owned almost half the stock, "consent[ed] to the taking" (Pet. 7); and (b) that the conviction rests upon the uncorroborated testimony of two perjurers, Cooper and Crocker (Pet. 14–21).

a. Petitioner was the principal officer and controlling stockholder of the corporation (owning slightly more than 50% of the outstanding shares) and personally supervised its operations (R. 14, 15, 103, 110–111, 171). In these circumstances the courts have uniformly held that diverted profits like those involved in the instant case are taxable as income to the corporation and are taxable as dividends, to the extent of earnings and profits, to the officer-stock-

holders receiving them. *Currier* v. *United States*, 166 F. 2d 346, 348 (C.A. 1); *Drybrough* v. *Commissioner*, 238 F. 2d 735, 738 (C.A. 6); *Simon* v. *Commissioner*, 248 F. 2d 869 (C.A. 8th); *Kann* v. *Commissioner*, 210 F. 2d 247, 251 (C.A. 3), certiorari denied, 347 U.S. 967; *United Mercantile Agencies, Inc.* v. *Commissioner*, 23 T.C. 1105, 1112, and cases cited. Whether petitioner's wife, the minority stockholder, acquiesced in the receipt of the over-invoice payments is of no consequence. *Union Stock Farms* v. *Commissioner* (C.A. 9), decided March 9, 1959 (59-1 U.S.T.C., par. 9317); *Drybrough* v. *Commissioner*, *supra*, p. 738; *Currier* v. *United States*, *supra*, p. 348.[4] *Sherin* v. *Commissioner*, 13 T.C. 221, the case relied upon by petitioner (Pet. 8-9), is easily distinguishable on its facts. In that case the corporate officer responsible for over-ceiling charges was not a controlling stockholder, and the overcharges were not levied on the regular customers of the corporation, but only upon seven new customers who received special services. The court found as a fact that it could not be said that Sherin had "intended to act for the corporation" (p. 229).

[4] Petitioner's attempted reliance on the *Currier* case (Pet. 7) is misplaced. He claims that in that case the appellate court "found it necessary to conclude that the shareholder in question [who owned only 75% of the stock] was in effect the owner of all the corporate stock." (Pet. 7). On the contrary, the court stated that the trial court had so found, but held that "even if this finding be disregarded, we think it clear that he was acting for and not against the interests of the corporation. Here an essentially individual ownership business is being run in a corporate form. The owner can hardly be considered to be acting against his own interests." 166 F. 2d at 348.

The argument now advanced by petitioner is an afterthought on appeal, no suggestion having been made in the district court that the evidence was inadequate in this respect. Moreover, there was evidence from which the jury could have concluded that petitioner would not be syphoning off hundreds of thousands of dollars from the corporation without his wife's knowledge.[4]

b. Cooper and Crocker were convicted of perjury for doing just what petitioner did in the instant case, *i.e.*, denying the receipt of cash over-invoice payments from the corporation's customers. They later changed their position, decided to tell the truth, and testified as witnesses for the Government. The defense, naturally enough, took full advantage of the situation and emphasized in the opening statement (R. 234) and throughout the trial that Cooper and Crocker were convicted perjurers whose testimony was not to be trusted. But, unlike the situation in the cases relied upon by petitioner (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, and *Mesarosh* v. *United States*, 352 U.S. 1), the Government and the jury were well aware of the earlier transgressions of these two witnesses, and evaluated their credibility accordingly. In the *Communist Party* and *Mesarosh* cases, moreover, the testimony of the challenged witnesses was of the *same* tenor as the allegedly perjurious testimony given by them in other proceedings.

[4] Petitioner testified that he consulted closely with his wife about business matters and that as soon as he learned about the over-invoice payments he discussed them with her. (R. 162, 168–169).

A showing of perjury in the other proceedings, therefore, would have tended directly to discredit their testimony in the proceedings being reviewed. Here, on the other hand, the testimony of Cooper and Crocker was directly contrary to the testimony for which they had been convicted of perjury and their perjury convictions thus tended, if anything, to corroborate their testimony in this case.

Of course, in circumstances such as these the testimony of a witness must be subjected to special scrutiny by the jury, and they were so instructed. (R. 185–186, 187–188.) But there is no legal impediment to their testifying, or any requirement that their testimony be corroborated. *United States* v. *Reina*, 242 F. 2d 302, 307 (C.A. 2d); *Haakinson* v. *United States*, 238 F. 2d 775, 779 (C.A. 8th). Moreover, the record shows that there was ample corroboration. Many purchasers of cars testified to the practice of Cooper and Crocker of collecting cash overages, at all three sales locations (*supra*, pp. 4–5) and one purchaser verified the fact that petitioner was aware of the practice (R. 24). Cooper's testimony was corroborated by his detailed records of the hundreds of sales involved (*supra*, p. 6). Petitioner admitted that despite the fact that he "had concluded that Mr. Cooper and Mr. Crocker had taken money from me after that perjury conviction and trial, I went ahead and paid them some salary and money while they were in prison for services rendered" (R. 170) and that he had made no attempt to collect on their $25,000 fidelity bonds (R. 171). Finally, the jury could use its common sense in concluding that petitioner, who

admittedly kept a close watch on all his enterprises (R. 171), would not have permitted Cooper and Crocker, mere employees, to keep, in addition to their salaries, hundreds of thousands of dollars realized from the sale of the corporation's automobiles.

2. Equally without merit is the argument (Pet. 9–13) that the first count of the indictment was barred by the statute of limitations. No such point was raised at the trial, and if it had been the Government would have introduced evidence to show that a complaint was properly instituted before a Commissioner of the United States within the six-year period of limitations (R. 217–218). Sec. 3748, Internal Revenue Code of 1939, *supra*, p. 2–3. Having failed to raise the issue at the proper time, petitioner cannot complain now. There is no conflict between the decision here and the cases relied upon by petitioner, *White* v. *United States*, 216 F. 2d 1 (C.A. 5), and *Flemister* v. *United States*, 260 F. 2d 513 (C.A. 5), for in those cases the issue was raised before or during the trial. In the recent case of *United States* v. *Keenan* (C.A. 7), decided March 26, 1959 (1959 A.F.T.R., ¶ 59–527), the Seventh Circuit, confronted with almost the identical contention made here, stated:

> The holding of these two cases [*White* and *Flemister*] adequately supports the proposition that a trial judge errs in overruling a motion to dismiss when he relies, through judicial notice, on something that does not exist in the record.
>
> We do not think that either case is applicable to the situation before us. The trial

> judge below was never given an opportunity to rule on the point. * * *
>
> We hold that as no objections were raised in the pleadings or upon the trial, the Government was not required to prove that the prosecution was not barred by the statute of limitations. We hold further that the defendant is in no position to raise the point for the first time on this appeal. Had this point been timely raised below, there would have been ample opportunity for the Commissioner to file the records with the District Court.

The complaint filed in this case was timely and was perfected by the issuance and service of a warrant of arrest (R. 217–221). When the complaint was transmitted to the district court, however, it was inadvertently filed in the jacket of a related case (involving petitioner and Crocker) (R. 221). It is clear, as the court below held (Pet. 9a), that petitioner could not have been prejudiced by this misfiling, and that the matter could have been straightened out at the trial if the issue had been raised.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

REPLY BRIEF FOR PETITIONER

Supreme Court of the United States

OCTOBER TERM, 1958

No. 800

ADOLPH C. BURGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition is largely a recitation of evidence, but nothing need be said here of this attempt to put the case in a purely factual posture. Nor need time be spent in countering the Government's fallacious suggestion that one of the questions presented by the petition is "an afterthought on appeal" (Br. 10). Record references are sufficient (R. 193, 198). The purpose of this reply is to consider only the Government's meager discussion of the legal issues raised by the petition.

I

Respondent first seeks to rescue the prosecution below from its failure to adduce any evidence tending to show that the money received by Cooper and Crocker constituted income to the corporation of which petitioner was president. Respondent does so by attacking petitioner's statement that "payments received by a shareholder upon the sale of corporate property have been held to be corporate income only if all the shareholders consent to the taking" (Pet. 7; Br. 8). Respondent states the rule to be that such payments increase corporate net income if received by a "controlling stockholder" (Br. 8, 9), even though the distribution of the diverted funds may bear no similarity to a dividend distribution, and even though the minority shareholders may think themselves defrauded. In support of this proposition, respondent cites (Br. 9) two cases which can only be read as supporting the petitioner's understanding of the rule,[1] one case which is at best ambiguous,[2] one case which is simply irrelevant,[3] and one case in which the court obviously did not

[1] Currier v. United States, 166 F.2d 346 (1st Cir. 1948); United Mercantile Agencies, Inc., 23 T.C. 1105 (1955), *rev'd on other grounds sub nom.* Drybrough v. Commissioner, 238 F.2d 735 (6th Cir. 1956). Respondent relies heavily (Br. 9 n. 3) on the fact that the court in *Currier* found it unnecessary to determine whether the 75% shareholder there involved was the "actual owner" of the remaining 25% of the stock. But the court did find it necessary to state that "the remaining 25% was held by his wife, who had received it as a 'gift' from him. She has never received dividends on it *and she has exercised no dominion or power over it.*" 166 F.2d at 348. (Emphasis added.)

[2] Simon v. Commissioner, 248 F.2d 869 (8th Cir. 1957) (sole shareholder).

[3] Kann v. Commissioner, 210 F.2d 247 (3d Cir. 1953), *cert. denied*, 347 U.S. 967 (diverted funds taxed to the diverters but not as dividends, the court having disclaimed knowledge, *id.* at 251, as to the existence of earnings and profits).

focus on the necessity of finding an increase in the *net* income of the corporation.[4]

Having thus discovered the "controlling shareholder" rule, respondent finds "easily distinguishable" the case of *Harry Sherin*, 13 T.C. 221, *acq.*, 1949-2 Cum. Bull. 1. The shareholder there involved, it is said, "was not a controlling stockholder" (Br. 9), while petitioner in the instant case owned "slightly more than 50% of the outstanding shares" (Br. 8). The fact of the matter is that there is conflicting testimony in the record (R. 14, 15, 103, 110-11, 137, 157) as to whether petitioner owned exactly 50% of the shares—as did the shareholder in *Sherin*[5]—or "slightly more than 50%." The jury was never instructed to resolve this conflict, as the trial court refused to give any instruction whatever on the definition of corporate income (R. 178-91, 193). Hence, even if respondent's rule of law be accepted, the record will not support its application in this case.

II

The petitioner reads the cases of *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, and *Mesarosh* v. *United States*, 352 U.S. 1, as establishing the rule "that prosecutors in federal tribunals may not rely on the testimony of witnesses who have perjured themselves with respect to the same matters" (Pet. 16). Respondent notes that those cases dealt with situations in which the transgressions of the wit-

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[4] Union Stock Farms v. Commissioner, No. 15783, 9th Cir., March 9, 1959 (59-1 U.S.T.C. ¶ 9317), discussed in detail at Pet. 7 & 8 n. 2.

[5] See 13 T.C.

nesses were not discovered until after trial (Br. 10), but does not discuss or dispute the analysis offered in the petition. In effect, the Government concedes that prosecutors are barred in some cases from relying on the testimony of perjurious witnesses. It argues only that Cooper and Crocker are not within that class of witnesses whose use by the prosecution this Court has proscribed.

Respondent's attempt to distinguish the *Communist Party* and *Mesarosh* cases is based on the statement that "the testimony of Cooper and Crocker was directly contrary to the testimony for which they had been convicted of perjury" (Br. 11). Respondent suggests that their prior perjury convictions corroborate their subsequent testimony rather than discredit it![6]

In fact, of course, the gentlemen in question were convicted of perjury only for having falsely sworn that they had received no cash payments upon the sale of automobiles. Their best story having put them in prison, it would have been surprising had they insisted on repeating it. Instead they came up with a new story, which had as its predicate the testimony of the unimpeached witnesses but which also added something new. They conceded they had taken the money, but decided they had given most of it to petitioner. The Government infers that they had finally "decided to tell the truth" (Br. 10). But it is at least equally likely that the change in their testimony was merely

[6] Respondent also purports to find "corroboration" of Cooper and Crocker's statement—that they gave petitioner money—in the testimony of unimpeached witnesses that they gave money to Cooper and Crocker, and in a group of undecipherable notebooks which standing alone were meaningless (R. 106-07) but which Cooper says were a record of the payments received by him.

a tactical move by Cooper and Crocker in their consistent pursuit of freedom from criminal prosecution and from civil liability for failure to pay their individual income taxes.

In the *Communist Party* and *Mesarosh* cases, this Court denied to the prosecution the privilege of having the trier of fact speculate as to whether the witnesses there involved were speaking truthfully or were continuing in a well established pattern of falsehoods. The witnesses having demonstrated both their willingness and their motivation to swear falsely on the subject matter in question, the use of their testimony by the Government could not bear the scrutiny of "fastidious regard for the honor of the administration of justice." *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 124. The Government is in no better a position here. For, although Cooper and Crocker have changed their testimony, the change shows neither that the motivation to lie has been banished nor that prison has reformed their morals. It cannot enhance their credibility.

III

Finally, respondent acknowledges that the record shows the first count of the indictment to be barred. Respondent also agrees that in such a state of the record a conviction cannot properly be obtained. It is claimed, however, that since "no such point was raised at the trial, . . . petitioner cannot complain now" (Br. 12).[7]

Respondent does not seek to defend the court of appeals in its use of material not properly in the

[7] As to whether the point was raised at trial, see R. 151, 200. The court below considered the point on the merits in spite of respondent's suggestion that petitioner had waived his objection.

record. Instead, this Court is told that there is no need to consider the limitations problem at all as there is a new ground—waiver—for sustaining the judgment below. This ground at best is a doubtful one. Three judges of the Court of Appeals for the Third Circuit, for example, have taken the position that a criminal conviction cannot be sustained when barred by the statute of limitations even if no objection was made at trial. *United States* v. *Waldin*, 253 F. 2d 558 (3d Cir. 1958) (dissenting opinion), *cert. denied*, 356 U.S. 973. If, as the Government apparently concedes, the decision below can be sustained only by accepting the doctrine of waiver, an additional reason for granting the writ is presented.

Respectfully submitted,

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SUPREME COURT, U.S.
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Supreme Court of the United States

PETITION FOR REHEARING

Supreme Court of the United States

OCTOBER TERM, 1958

No. 800

ADOLPH C. BURGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

This petition for rehearing of the Court's order of May 18, 1959, in the instant cause is filed to present to the Court a significant issue not raised in the petition for a writ of certiorari.

Petitioner here was indicted for willfully attempting to evade corporate income taxes on monies paid "to the corporation by the purchaser over and above the amount entered on the corporation's books" (R. 12). The new issue presented is whether an individual may be convicted under such an indictment when the tax liability for the items omitted from the corporate return is doubtful and the Government has made no effort to prove that the individual believed that the items omitted constituted taxable corporate income.

Petitioner was a 50 per cent shareholder of the corporation whose tax was alleged to have been understated. The other shareholder was petitioner's wife, who had contributed one half the capital investment out of which the corporate entity was created. The items in question consisted of certain cash payments over and above the invoice price made to nonshareholder employees by purchasers of automobiles in order to obtain preferential treatment. The indictment charged that these payments were corporate income. As to the evidence, there was testimony which, if admissible, tended to show that some of this money was received from these employees by the petitioner himself. The trial court proceeded on two assumptions: that this money, if received by petitioner, served to increase the corporate net income; and that, if so received, there had been a willful attempt to evade corporate income tax. The verdict of guilty indicates that the jury believed petitioner himself received the money. It indicates no more.

By affirming a conviction for willful attempt to evade corporate income taxes despite the complete absence of evidence that petitioner knew such taxes to be owing, the court below has rendered a decision which is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Macias* v. *Commissioner*, 255 F.2d 23 (7th Cir. 1958). The *Macias* case involved a corporate officer who received from one of his company's customers side payments with respect to sales of corporate property and did not report the proceeds of such payments on his personal income tax return. The Commissioner assessed deficiencies and fraud penalties, and the Tax Court found the assessment to be correct. The Court of Appeals, although agreeing

that these payments had constituted taxable income to Macias, found that the fraud penalty could not properly be imposed. That court held that the decision in *Commissioner* v. *Wilcox*, 327 U.S. 404, provided the taxpayer with reason "to think that the payments received by him did not constitute reportable income." 255 F.2d at 28. And while there was no proof that the taxpayer had in fact relied on the *Wilcox* decision, the court held that the Government had failed to meet its burden by failing to show that he had *not* so relied. The Court of Appeals therefore held that the imposition of civil fraud penalties rested on nothing but conjecture and suspicion and could not be sustained.

Thus, where the taxpayer has a reasonable legal basis for believing that the omitted items of income are not required to be reported, the Court of Appeals for the Seventh Circuit holds that civil fraud penalties may not be sustained unless the Government affirmatively shows that the taxpayer believed he had an obligation to report such items. The court below, on the other hand, holds that a criminal conviction can be sustained with no such affirmative showing. Unless it be assumed that a criminal conviction can be sustained on less evidence than is necessary to support a civil fraud penalty, the conflict between the Seventh and Eighth Circuits cannot be resolved.

The factual situation in the instant case is in all significant respects identical to that in the *Macias* case. The petitioner denied that he received or knew of the payments in question. As in *Macias*, there was no evidence indicating that, in filing the corporation's returns, he believed that such payments were not reportable corporate income, even if received by him.

But, also as in *Macias*, the Government offered nothing to show that petitioner did believe such payments were reportable corporate income. At a bare minimum, the *Macias* case holds that a finding of fraud cannot properly be made in the absence of such evidence if the taxpayer could reasonably have believed that the items in question were not to be included in income. And it is as clear in the instant case as it was in *Macias* that the petitioner could reasonably have held such a belief.

The fact of the matter is that even today—eleven years after the second of the returns which is alleged to have been fraudulent—the decided cases with but one exception have held that money received and retained by a shareholder on the disposition of corporate property does not constitute corporate income unless all the shareholders consent to such receipt and retention.* Thus, entirely apart from the question whether the Government has proved the requisite criminal intent, the great weight of authority indicates that petitioner cannot have committed the crime for which he was indicted. But even if it be conceded that the Government was able to prove the existence of corporate income, it is perfectly clear that petitioner could reasonably have believed that such income did not exist. Only if the *Macias* case is repudiated can petitioner be held to have been proved guilty of the crime of which he was accused.

Nor does the *Macias* case stand alone. In *United States* v. *Martell*, 199 F.2d 670 (3d Cir. 1952), *cert. denied*, 345 U.S. 917, a case involving the meaning of willfulness under the statutory section here involved, the Court of Appeals for the Third Circuit held that a

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* These authorities are discussed at pp. 7-9 of the Petition for a Writ of Certiorari, pp. 8-9 of the Brief for the United States in Opposition, and pp. 2-3 of the Reply Brief for Petitioner.

conviction for a willful attempt to evade tax "requires a specific wrongful intent to conceal an obligation *known to exist*, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is *supported by the evidence and explained to the jury.*" 199 F.2d at 672. (Emphasis added.)

Moreover, in a case with facts similar but more favorable to the Government than those of the instant case, the Tax Court has held that fraud penalties could not be sustained. That case is *United Dressed Beef Co.*, 23 T.C. 879 (1955), *acq.*, 1955-2 C.B. 9. There, over-invoice cash payments by purchasers of corporate property were divided between the two shareholders in proportion to their stock holdings, while here it is alleged only that one of two equal shareholders received such payments. There, the Government's burden was to prove civil fraud merely by "convincing evidence," while here it was to prove fraud beyond a reasonable doubt. Yet in that case the court refused to find fraud in the failure to report the payments as income to the corporation because it was not "affirmatively shown by the [Government] that the responsible officers of the corporation believed the cash collections to represent income to the corporation in the fiscal years ending prior to 1945," and because with respect to later fiscal years the taxpayers' competent counsel advised "that this money was not income to the corporation." 23 T.C. at 887, 888.

To the extent that the instant case differs from *United Dressed Beef Co.*, the differences militate against the judgment below. For, in dealing with fiscal years which roughly coincide with those involved in the instant case, the Tax Court held that there was no fraud although the income was more clearly income

to the corporation than in the instant case, and although the Government's burden of proof was less exacting.

The only alternative to concluding that the instant case is in conflict with *Macias* is to conclude that the court below sustained petitioner's conviction on the ground that he must have been guilty of *something*. The prosecuting officials may have believed that petitioner had willfully violated the emergency price control law. They may have believed that he had willfully understated his personal income. They may even have believed him to be "an all round, no good dissolute person." *Bloch* v. *United States*, 221 F.2d 786, 790 (9th Cir. 1955). But having indicted for willful attempt to evade corporate income tax, their obligation was to prove that crime and no other.

The conflict between the *Macias* case and the decision below is unmistakable if the indictment defines and limits, as it must, the crime of which a defendant may be convicted. Nor does this conflict involve an unimportant question of law. Rather it concerns the right of an individual to be acquitted unless the prosecution has proved every essential element of the crime specifically charged in the indictment. This right is one of the basic civil rights guaranteed by the Constitution. As urged below and ignored by the court, the denial of this right was "such as to constitute a denial of due process of law." Indeed, if a conviction for willful attempt to evade corporate income taxes can be obtained where the Government makes no attempt to show either that the evasion was willful or that the income was corporate, any future comment on procedural due process will contain a significant footnote when tax evasion cases are discussed.

In addition to the foregoing reason for rehearing this cause, the attention of the Court is called to the petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit filed on June 3, 1959, in *Audett v. United States,* No. 975. One of the questions presented by that petition is whether this Court should overrule prior decisions and now establish for the federal courts, in accordance with a growing trend in state law, the rule that one accused of a crime cannot be convicted solely on the uncorroborated testimony of purported accomplices. The only evidence in the instant case connecting petitioner with the alleged crime consisted of such testimony. If a writ of certiorari should issue in the *Audett* case, it would be appropriate for this Court to review the instant case as well.

For the reasons stated it is respectfully suggested that the petition for rehearing should be granted.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

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